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#'s 93-1148 and 93-1149

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

#93-1148

ALEXANDER LOCE, *Petitioner,*

v.

STATE OF NEW JERSEY, *Respondent.*

#93-1149

TINA KRAIL, et. al., *Petitioners,*

v.

STATE OF NEW JERSEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF OF

JOSEPH SCHEIDLER AND THE PRO-LIFE ACTION LEAGUE

AND OF TEXAS BLACK AMERICANS FOR LIFE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LOCE AND PETITIONERS KRAIL, ET. AL.

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QUESTIONS PRESENTED

Whether anything in the Due Process Clause, as explained in Roe v. Wade, requires the states to make any person a criminal?

Whether the decision of the trial court, pursuant to Roe, to exclude evidence which negates the criminal state of mind places Roe squarely at odds with other precedents of this Court?

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INTEREST OF THE *AMICI*

Joseph Scheidler and the Pro-Life Action League seek to promote public awareness of the prevalence of abortion, and to protest against its performance; Joseph Scheidler and the Pro-Life Action League were named party defendants/respondents in this Court's case of first impression, decided Monday, January 24, 1994, on the question of whether a plaintiff in a case based on the Racketeer Influenced and Corrupt Organizations Act (RICO) must prove an economic motive on the part of the defendants.

Texas Black Americans for Life is an organization which seeks to promote awareness that abortion is a tool of racial genocide.

SUMMARY OF ARGUMENTS

The holding of the trial court, which will be followed in other cases, overrules this Court, places its precedents at odds with one another, and illustrates that Roe v. Wade fosters erroneous decisions by the lower courts.

Not allowing one to introduce evidence which negates the criminal state of mind violates the Due Process Clause. Also, Roe does not even require the exclusion of the evidence offered at trial.

Nothing in the Due Process Clause requires the states to make any person a criminal.

This case illustrates that Roe v. Wade is unsound in principle and unworkable in practice.

Planned Parenthood v. Casey succeeded only in confusing the law of *stare decisis*. Further, this case will enable this Court to do what it wanted to do in Casey but was unable to accomplish.

ARGUMENT

I. NOTHING IN THE DUE PROCESS CLAUSE REQUIRES THE STATES TO MAKE ANY PERSON A CRIMINAL.

The trial court concluded that the conviction of the defendants was compelled by Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), which was based on the Due Process Clause of the Fourteenth Amendment. But the Due Process Clause has never been held to require the states to make any person a criminal; it has only been used the other way—prohibiting the states from making persons criminals in certain instances.

The submission that the Due Process Clause, which *prohibits* the states from extending their criminal laws against private citizens in certain instances, now *affirmatively requires* the states to extend their criminal laws against private citizens in certain instances, is too novel a theory for this Court to let stand.

The trial court's holding turns our entire body of jurisprudence on the Due Process Clause inside out. That view of the Due Process Clause is like looking through a pair of binoculars the wrong way. And it is statism, one of the things which the Fourteenth Amendment was designed to protect us against.

By taking this case, this Court can prevent the development of the erroneous notion that the Due Process Clause requires the states to make certain persons criminals. If this Court refuses to take this case, it can only set the stage for a more egregious upheaval in our law later on, when the doctrine is firmly entrenched.

II. THE LANGUAGE OF ROE v. WADE DOES NOT REQUIRE THE EXCLUSION OF THE EVIDENCE OFFERED AT TRIAL.

The trial court erred in thinking Roe requires a court to exclude evidence, offered by the defense in a criminal case, which

demonstrates a reasonable, good faith belief that an unborn child is a person. The language of Roe does not support this conclusion.

This Court said in Roe,

> "All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729, 35 L.Ed.2d at 180.

This Court also said,

> "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182.

A. THERE IS NO STATE ACTION.

In Roe, the State of Texas could not, by adopting one theory of life, override the rights of the pregnant woman. But the case at bar involves action by a private citizen, not by a state. And without state action, there is no denial of Due Process. As this Court said,

> "The Fourteenth Amendment protects this [Due Process] interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action." Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 485, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565, 575 (1988).

This Court noted, in the same paragraph, that state action may be found "...when private parties make use of state procedures with the overt, significant assistance of state officials... ." 485 U.S.

at 486, 108 S.Ct. at 1345, 99 L.Ed.2d at 576. But no such thing occurred here.

Nor is the law of the State of New Jersey pertaining to the reasonable, good faith belief of the need to protect a third person an attempt to frustrate Roe. For that law pertains to all cases in which the defense of a third person is implicated, not just abortion. State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965).

Further, the provisions of New Jersey law relied on for the affirmative defenses have been in existence since long before Roe. Article One of the Constitution of the State of New Jersey was adopted in 1947. N.J.S.A. 2C: 3-5 and 18-3 are simply reenacted versions of statutes which were in place since 1898.

Also, as Prof. Knowlton has explained, the other affirmative defense provisions which were asserted were simply formal codifications of the law of the State of New Jersey as it had already existed. *See*, Knowlton, Comments Upon the New Jersey Penal Code, 32 Rutgers L. Rev. 1, 3 (1979).

Further, the reluctance of the New Jersey judicial system at all levels to rule in favor of the petitioners demonstrates that the law of the State of New Jersey is not an attempt to frustrate Roe.

B. FOURTEENTH AMENDMENT PERSONHOOD IS NOT AN ELEMENT OF THE AFFIRMATIVE DEFENSES.

The trial court based its decision on this Court's holding in Roe that an unborn child is not a person within the meaning of the Fourteenth Amendment. But this has no application here.

Fourteenth Amendment personhood is a status whereby a given *res* may assert its own rights against state action. With the exception of *in rem* proceedings, the status is inherent—at all times, for all purposes, and against all others—in the *res* itself; it exists independently of anyone else's actions or thought processes.

The focus of the affirmative defenses raised at trial, however, is simply not on the thing sought to be protected; the defenses pertain to something which exists only for a moment in the mind of the criminal defendant: the reasonable, good faith belief which motivated the conduct.

Fourteenth Amendment personhood (i.e. the possession by a *res* of federal rights against state action) need not obtain in the thing sought to be protected; the governing personhood is personhood within the meaning of state law. For it is from the state constitution that the legislature and the state courts derive their authority to pronounce the affirmative defenses, and to define the terms therein; and one of the defenses is Article One of the state constitution itself.

The language of the leading New Jersey case would even, on its face, support the position that the status of personhood need not obtain in the thing sought to be protected. Indeed, if someone used force to prevent someone from burning a rumpled-up bundle of clothing which he reasonably, and in good faith, thought was a person lying helpless on the ground, the fact that there was only clothing would not seem to defeat the defense.

Consider what the Supreme Court of New Jersey said,

> "There are, however, two approaches as to the scope of the right of one person to intervene in defense of another. One is that the fault of the defended party is imputed to the one who intervenes on his behalf, while the other is that the intervening party is bound only by his own intent. The former, commonly referred to as the 'alter ego' rule, emphasizes that the right of one person to defend another is co-extensive with the right of the other to defend himself. The latter categorized as the 'objective test' theory, proceeds on the thesis that one who intervenes in a struggle under a reasonable but mistaken belief that he is protecting another who he assumes is being unlawfully assaulted is thereby exonerated from criminal liability. As stated by

Bishop (1 Bishop, Criminal Law (Sect.) 303, p. 204 (9th ed. 1923)):

> 'What is absolute truth no man ordinarily knows. All act from what appears, not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move. *** All, therefore, must, and constantly do, perform what else they would not, through mistake of facts. *** '

"See generally 1 Wharton supra, (Sect.) 219; Comment, 20 Wash. & Lee L. Rev. 98 (1963); Comment, 64 W.Va. L. Rev. 342 (1962).

> "New Jersey has aligned itself with the latter view; the test of whether a party may intervene in defense of a third person being determined by the subjective intent of the intervenor, subject only to the qualification that a jury objectively find that he reasonably arrived at the conclusion that the *apparent* victim was in peril, and that the force he used was necessary. Thus, the so-called "reasonable mistake of fact" doctrine is given its due, both as to the amount of force and the initial lawfulness of the intervention, *and precludes criminal liability* even though it later appears that the person in whose behalf he intervened was in fact the aggressor or that no defensive measures on his part were actually necessary. [citations omitted] Such a view has been recommended by the American Law Institute in its Model Penal Code..." (citation omitted) State v. Fair, 45 N.J. 77, 92-93, 211 A.2d 359, 367-368 (1965). (emphasis supplied)

Thus we see that the Supreme Court of New Jersey, upon careful consideration of the question, expressly rejected the doctrine which says that the defenses are available only when the one sought

to be protected is in fact a person who has the right to self-defense. The focus instead is solely on the state of mind of the defendant.

III. NOT ALLOWING ONE TO INTRODUCE EVIDENCE WHICH NEGATES THE CRIMINAL STATE OF MIND VIOLATES THE DUE PROCESS CLAUSE.

The effect of a denial of this petition will be to exclude the evidence offered at trial, and set as precedent the exclusion of similar evidence in future cases, at least in the State of New Jersey. This Court has recognized, however, that not allowing the introduction of relevant evidence in a criminal case violates the Due Process Clause. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 (1973); U.S. v. Nixon, 418 U.S. 683, 711-713, 94 S.Ct. 3090, 3109-3110, 41 L.Ed.2d 1039, 1066-1067 (1974). Such shall be the case here if the petitioners are not afforded their opportunity to present evidence of their reasonable, good faith belief that an unborn child is a person.

Under New Jersey law, defense of a third person negates an element of the prosecution's case in chief: the criminal state of mind; and New Jersey law requires the introduction of such evidence. As the New Jersey Supreme Court said,

> "An essential element of the charge of murder is malice [citation omitted], and in order for criminal liability to attach there must be a concurrence of an 'evil-meaning mind with an evil-doing hand.' [citations omitted] Basically, the so-called 'affirmative defense' of defense of another in murder cases *negates the existence of the essential element of malice*. What was said in State v. Abbott, 36 N.J. 63, 72, 174 A.2d 881, 868 (1961), in connection with self-defense is equally applicable to defense of a third party:
>
> > *** '...if such evidence appears either in the State's case or upon the defendant's case, the issue must be left to the jury with this instruction: that the burden

> is upon the State to prove beyond a reasonable doubt that the defense is untrue, and hence there must be an acquittal if there is a reasonable doubt as to whether defendant did act in self-defense within the definition of that defense. ***' " State v. Fair, 45 N.J. 77, 90-91, 211 A.2d 359, 366 (1965) (emphasis supplied).

In Chambers and Nixon this Court effectively recognized that censorship in the courtroom is as destructive of liberty as censorship in the press. The Court should not retreat from this.

IV. THE DECISION OF THE TRIAL COURT PROMOTES A GROSS BREACH OF THE SEPARATION OF POWERS AND OF FEDERALISM.

It would be difficult to imagine a more radical breach of the separation of powers. If this Court were to acquiesce continually in holdings such as this one, this Court would effectively require the states to repeal certain laws of their own and make new ones against private citizens whose actions frustrate restrictions which this Court has placed on state action, not on the action of private citizens.

Further, given the federal nature of our Union, it would be difficult to imagine a more gross breach of federalism, going even beyond the boundaries set down in Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). For in Jenkins, at least, this Court construed the scope of authority of Article III courts under an act of Congress.

The acceptance by this Court, and other federal courts, of what happened in this case, however (and will happen again in later cases), would completely circumvent the requirement recognized in Jenkins that the overriding of state sovereignty by federal law take place only in pursuance to an act of Congress specifically intended to do such a thing. *See also*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

This would constitute a dangerous precedent for allowing this requirement to be completely overlooked in other areas, effectively rendering the federal judiciary a body of general jurisdiction rather than one of a limited nature.

It would render the Tenth Amendment a curiosity, a conversation piece, or perhaps, at best, an interesting piece of wallpaper. But it would cease to be a statement of law in our most basic governing document.

V. CLARIFICATION BY THIS COURT IS NEEDED BECAUSE THE HOLDING OF THE TRIAL COURT OVERRULES THIS COURT, AND DEMONSTRATES THAT ROE PLACES THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER WHILE FOSTERING ERRONEOUS DECISIONS BY THE LOWER COURTS.

In Planned Parenthood v. Casey the Joint Opinion expressed the view that courts building upon Roe will not be likely to hand down erroneous decisions as a consequence. Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2810, 120 L.Ed.2d 674, 702 (1992) (Joint Opinion). But the trial court's action in the instant case, overruling this Court's precedents, and setting them at odds with each other, belies that view, as does the record subsequent to Roe.

Eventually this Court must rule on the issues presented in this case. If it denies certiorari in every such case presented, it will have ruled *sub silencio on* these issues, but without giving society the benefit of its reasoning.

A. THE TRIAL COURT OVERRULED THIS COURT.

By refusing to consider evidence of the petitioners' reasonable, good faith belief that Mr. Loce's unborn child was a person in need of their intervening help, the trial court overruled this Court's holdings in Chambers and Nixon, *supra*. Other courts, following the lead in this case, will do so also.

B. ROE REQUIRES UNHEARD OF AND UNWARRANTED APPLICATIONS OF THE DUE PROCESS CLAUSE.

If this Court allows judgments such as the one in this case to stand, it will be irrefutable that this Court will have allowed an expansion of Due Process law into the field of affirmatively requiring the states to make certain persons criminals. So radical a change as that should not come from a silent Court.

Further, unless this Court eventually reverses a case like this one, it will be equally clear that this Court will have accepted the unheard of doctrine that nonpersonhood status in one thing diminishes the rights held by another, one who is a person. Such a radical change as this likewise should not come from a silent Court.

Also, Roe has even been relied upon to enjoin the operation of a state statute without there ever being a finding of unconstitutionality or any other violation of federal law. Ragsdale v. Turnock, 734 F.Supp. 1457 (N.D. Ill. 1990); *aff'd* 941 F.2d 501 (7th Cir. 1991); *cert. den. sub nom.* Murphy v. Ragsdale, ___U.S. ___, 112 S.Ct. 879, 116 L.Ed.2d 784 (1992). In that case the District Court accepted a settlement proposal in which the Attorney General of a state and some private citizens literally rewrote a state statute, actions on their part which clearly lacked any authority under the state constitution.

Simultaneously, that settlement proposal struck down the most basic health and safety requirements: that an abortion clinic's hallways be wide enough for an ambulance stretcher to pass through, that any such clinic be within a few minutes' ambulance ride of a hospital, and that the ventilation system be designed to prevent widespread contamination by airborne bacteria, which can cause infections in a woman's bleeding reproductive tract. Thanks to that settlement proposal, it is now legal in the State of Illinois for the abortionist to scrub his hands in the same sink in which the janitor cleans his toilet bowl brush.

It gets worse. Roe has been relied on to strike down a state statute prohibiting fetal experimentation or the sale of unborn children. Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-1377 (N.D. Ill. 1990); *aff'd* 914 F.2d 260 (7th Cir. 1990); *cert. den. sub nom.* Scholberg v. Lifchez, 498 U.S. 1069, 111 S.Ct. 787, 112 L.Ed.2d 850 (1991).

C. ROE SETS THIS COURT'S PRECEDENTS AT ODDS WITH ONE ANOTHER.

In Casey the Joint Opinion noted that if Roe were to portend a development "at odds with other precedent for the analysis of personal liberty," this would prove to be grounds for overruling Roe. *See*, Casey, *supra*, 112 S.Ct. at 2812, 120 L.Ed.2d at 704. Such is what has happened here. For in not allowing the petitioners to introduce evidence negating the criminal state of mind, the trial court set this Court's precedents of Roe, on the one hand, and Chambers and Nixon, *supra*, on the other hand, at odds with one another.

We are left wondering what is good law and what isn't. The words of the Joint Opinion in Casey are again applicable here:

"Liberty finds no refuge in a jurisprudence of doubt." 112 S.Ct. at 2803, 120 L.Ed.2d at 693.

Also, the concept that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals has never arisen in our jurisprudence before, and will be applicable, as a practical matter, only against those who engage in civil disobedience because of their political and religious opposition to abortion. As such, it will effectively be "a law directed at speech itself," in contravention of this Court's First Amendment holding in Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2541, 105 L.Ed2d 342, 355 (1989).

Further, even though the trespass statute under which the petitioners were convicted may be generally applicable to all, so as

to avoid any clash with the Free Exercise Clause of the First Amendment, it will remain the case, nevertheless, that the doctrine that the Due Process Clause itself affirmatively requires the states to make certain persons criminals will not be generally applicable to all; this doctrine itself will be applied only to abortion protesters, and as such will contravene this Court's numerous prior holdings. *See*, Employment Division v. Smith, 494 U.S. 872, 876-878, 110 S.Ct. 1595, 1599-1600, 108 L.Ed.2d 876, 884-885 (1990).

D. THE TRACK RECORD UNDER ROE DEMONSTRATES THAT ROE IS THE PROBLEM.

The above cited examples of chaos in our jurisprudence all have one thing in common: Roe. In Casey the Joint Opinion speculated that Roe might be *sui generis*. But *sui generis* just doesn't explain it. Roe is a renegade---an accident waiting for the next opportunity to occur, waiting for its next victim (Due Process, the First Amendment, unborn children, federalism, the separation of powers, expectant fathers, etc.) to step in line.

The chaos begins in Roe itself, as the Joint Opinion in Casey learned when it tried to untangle the basic premise of Roe from Roe's rigid, trimester framework 112 S.Ct. at 2816-2821, 120 L.Ed.2d at 709-716. Roe was also contradictory in its approach to the relevance of biomedical facts to the protection of the unborn.

This Court first said that the findings of the discipline of biology were of no moment in determining whether an unborn child is a person or not. 410 U.S. at 159, 93 S.Ct. at 730, 35 L.Ed.2d at 181. But just a few pages later this Court then went on to deny protection to the unborn in the early stages of pregnancy on the basis of "the now-established medical fact...that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." 410 U.S. at 163, 93 S.Ct. at 731-732, 35 L.Ed.2d at 182. This juxtaposition of reliance on medical facts to deny protection for the unborn, coming immediately after a total disregard for such facts in recognizing rights for the unborn, suggests a double standard in the most obvious way.

Significantly, the Joint Opinion in Casey chose to recognize the obvious: medical facts pertaining to the unborn child---in Casey, the concept of viability---are indeed relevant in determining the status of laws pertaining to the unborn child. 112 S.Ct. at 2817, 120 L.Ed.2d at 710.

Yet Roe remains today what Justice White said of it on the day it was decided: "...an exercise of raw judicial power...an improvident and extravagant exercise of the power of judicial review...[with] no constitutional warrant..." *See*, Roe, 410 U.S. at 222, 93 S.Ct. at 763, 35 L.Ed.2d at 196 (White, J., dissenting).

Roe has tied the cloth of our jurisprudence in a knot. It has done so before. *See*, Bopp and Coleson, The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal, 2 B.Y.U. J. Pub. L. 181 (1989). It continues to do so now. It begs for reversal.

VI. THIS CASE ILLUSTRATES THAT ROE v. WADE IS UNSOUND IN PRINCIPLE AND UNWORKABLE IN PRACTICE.

The clash of interests here is irreconcilable: On the one hand we have pregnant women claiming a constitutional right under the Due Process Clause, a right which the justices who authored the Joint Opinion in Casey admitted they might not have recognized had the case been before them in the first instance. *See*, Casey, *supra*, 112 S.Ct. at 2817, 120 L.Ed.2d at 711.

On the other hand we have the protesters claiming their right under the Due Process Clause, a right never questioned by this Court, to present evidence which negates the criminal state of mind. The need of the State of New Jersey to uphold the law and preserve the peace, meanwhile, is well known to all.

The arguments of the petitioners---which we accept---regarding the personhood of unborn children aside for a moment, this case does illustrate, if nothing else, that there is a compelling

state interest in the area of abortion, an interest which requires the overruling of Roe.

Roe is unsound in principle and unworkable in practice. As this Court has noted, if a prior holding of this Court is later found to be unsound in principle and unworkable in practice, that will constitute grounds for overruling the prior case. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 105 S.Ct. 1005, 1015, 83 L.Ed.2d 1016, 1031 (1985). The Joint Opinion in Casey recognized this would apply to Roe. *See*, Casey, *supra*, 112 S.Ct. at 2809, 120 L.Ed.2d at 700.

A. ROE IS NOT NEEDED TO PROTECT WOMEN AGAINST FORCED ABORTIONS.

In Casey the Joint Opinion expressed the concern that without Roe women could be forced to undergo abortions against their will. 112 S.Ct. at 2811, 120 L.Ed.2d at 703. But as Justice O'Connor pointed out in a case involving the other end of life's spectrum, any forced bodily invasion would constitute a classic example of a forcible restraint of one's liberty; it would also constitute an intrusion into one's body of the type that would burden the woman's liberty, dignity, and freedom to determine the course of her own life. Thus, it would run afoul of this Court's previously stated notions of constitutionally permissible state action. *See*, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. at 287-289, 110 S.Ct. at 2856-2857, 111 L.Ed.2d at 247-249 (1990) (O'Connor, J., concurring).

VII. PLANNED PARENTHOOD v. CASEY SUCCEEDED ONLY IN CONFUSING THE LAW OF *STARE DECISIS*.

In Casey the Joint Opinion went to great lengths to state that the decision reached therein was required by the doctrine of *stare decisis*. *See*, Casey, *supra*, 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. Paradoxically, however, the Joint Opinion overruled this Court's precedent on *stare decisis* without even stating why it was doing so.

In 1932 Justice Brandeis penned his famous dissent in which he wrote,

> "Stare decisis is usually the wise policy, because in most matters is more important that the applicable rule of law be settled than that it be settled right. [citation omitted] This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." (citation omitted)

Burnett v. Coronado Oil and Gas Co., 285 U.S. at 406-408, 52 S.Ct. at 447-448, 76 L.Ed. at 823-825 (1932) (Brandeis, J., dissenting). The footnotes in Justice Brandeis' opinion, omitted above, and footnote four of his opinion following the above quoted text, cite a very large number of cases as examples of what he was saying.

The force of this logic was finally expressly adopted by this Court a year after Roe was decided. *See*, Edelman v. Jordan, 415 U.S. 651, 671, n. 14, 94 S.Ct. 1347, 1359, n. 14, 39 L.Ed.2d 662, 667, n. 14 (1974). It has been followed by this Court since then. *See*, Solario v. U.S., 483 U.S. 435, 450, 107 S.Ct. 2924, 2933, 97 L.Ed.2d 364, 378 (1987).

In Casey, however, the Joint Opinion did not follow this precedent on *stare decisis*. The Joint Opinion did not even confront the issue, let alone explain why it was doing what it did. Only a fleeting reference to Burnett was made, one which did not even acknowledge the fact that Justice Brandeis' reasoning had been adopted by this Court. *See*, Casey, 112 S.Ct. at 2808, 120 L.Ed.2d at 700.

Consequently, the Joint Opinion, in attempting to uphold the doctrine of *stare decisis*, overruled this Court's precedent on *stare decisis*, and succeeded only in confusing that area of law. That this should be done by only three members of this Court---and *only* in an abortion case!---speaks volumes about this Court's willingness to bend the rules any time the topic of abortion is at hand.

Is the rule of Justice Brandeis, adopted by this Court in Edelman, still good law? Further clarification is needed.

In reconsidering this question (which Casey means this Court must surely do again someday), this Court should recognize that of the two views of *stare decisis* on constitutional law---the view of Justice Brandeis, and the one adopted by the Joint Opinion in Casey---only one is consistent with the nature of a constitution. For if a constitution is a standard against which all other law---opinions of this Court included---is to be measured, then any departure from it, whether it be legislative or judicial in nature, must be recognized as error and corrected.

Chief Justice John Marshall, in considering a case in constitutional law, reminded us,

"...we must never forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 4 Wheat. 316, 407, 4 L.Ed. 579, 602 (1819). (emphasis in original)

To do otherwise is to stand the very nature of a constitution on its head. The substantial obstacles raised by Article V to the amending of the U.S. Constitution were created to protect the minority from the whim of the majority. But if this Court adopts the same rule about overruling erroneous precedent in constitutional law as it does in statutory cases, it will place upon a minority the impossible task of obtaining a super majority to amend the Constitution so as to overrule the erroneous precedent. A decision by this Court not to overrule erroneous precedent on constitutional

issues will thus become a means of turning the guarantees of Article V inside out.

The opinion of Justice Brandeis gives further instruction, saying,

> "In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.
>
> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution. **** *This is strikingly true of cases under the due process clause* when the question is whether a statute is unreasonable, arbitrary, or capricious..." *See*, Burnet, *supra*, 285 U.S. at 409-410, 52 S.Ct. at 448-449, 76 L.Ed. at 826. (emphasis supplied)

In Casey the issue was what would happen to the Court's legitimacy if it should overrule precedent. 112 S.Ct. at 2814-2816, 120 L.Ed.2d at 706-709. But none will ever question the legitimacy of a Court which recognizes that it must submit itself to the very Constitution which it is established to uphold and defend, and which pays homage to the patriots who fought and gave their lives to enshrine that document as the supreme law of the land.

VIII. THIS CASE WILL ENABLE THIS COURT TO DO WHAT IT WANTED TO DO IN CASEY BUT WAS UNABLE TO ACCOMPLISH.

In Casey the Joint Opinion stated that the Court was reaching the decision it did because doing so was necessary to fulfill this Court's perceived mission to take on such issues and settle them

with finality on behalf of the nation as a whole. Casey, *supra*, 112 S.Ct. at 2815, 120 L.Ed.2d at 708. In doing so the Joint Opinion went to great lengths to reaffirm Roe's central holding repeatedly, so as to leave no doubt as to what it was doing. 112 S.Ct. at 2804, 2808, 2816-2818, 2821, 120 L.Ed.2d at 694, 699, 709-712, 715-716.

Simultaneously, however, the Joint Opinion went out of its way to note that none of the criteria for reexamining the precedent of Roe *de novo* seemed to be present, and that thus the Court would not do so in that case. 112 S.Ct. at 2808-2816, 120 L.Ed.2d at 699-709. This was true even though those who authored the Joint Opinion declared that they were expressing no comment as to whether they would have agreed with the holding in Roe had the case been before them in the first instance. 112 S.Ct. at 2817, 120 L.Ed.2d at 711. The possibility of reexamining Roe at a later date, when the right case came along, was reserved by the Joint Opinion. 112 S.Ct. at 2808-2815, 120 L.Ed.2d 699-704, 706, 708-709.

These two concepts—settling Roe once and for all, and expressly avoiding reexamining it *de novo* (while keeping that option open for a future case), operate to the exclusion of each other. Roe can never be settled once and for all while this Court keeps brushing aside opportunities to reexamine it and tell us whether it is truly a case which can stand the test of time.

There could be no better case for finally settling this once and for all. For if this Court is going to reaffirm Roe in a case in which:

1.) the father of an unborn child was turned down by the judiciary in his attempt to seek an injunction against the destruction of his own child;

2.) one in which the trial court denied him the opportunity to present evidence which negates the criminal state of mind, thereby overruling the precedents of this Court itself on that point;

3.) one in which voluminous testimony of new facts elucidated since Roe was offered at trial by internationally renowned experts in support of the personhood of the unborn child and the newly found capacity of unborn children to feel pain;

4.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that the Due Process Clause places an affirmative obligation on the states to make certain persons criminals (and one which would apply to no one of any other political or religious conviction, at that);

5.) one in which this Court would, for the sake of preserving Roe, adopt the extraordinary new doctrine that nonpersonhood status in one thing diminishes the rights held by one who is a person;

6.) one in which this Court would, for the sake of preserving Roe, countenance a breach of the highest order of the separation of powers and of federalism; and

7.) one in which this Court, for the sake of preserving Roe, would be content to leave its precedents concerning Due Process and First Amendment interests at odds with themselves;

then nothing will ever get this Court to change its mind about Roe. And those of us who someday hope to achieve an overruling of Roe will know that no short term gain is to be had, and that our strategy must be for the long term in the strictest sense.

On the other hand, if Roe is the type of case which will not stand the test of time, and will fall upon reexamination of it *de novo*, there could be no better case than this one for telling us that this is so.

Either way, this case will enable this Court to do what it wanted to do in Casey but could not accomplish: settle the status of Roe once and for all.

IX. THE RECORD AT THE TRIAL LEVEL INVITES A REEXAMINATION OF ROE.

The record at trial is well developed. The petitioners presented ample evidence of facts newly elucidated since Roe was decided concerning the personhood Mr. Loce's unborn child, and its capacity to feel pain; there was also ample opportunity for cross-examination.

In Casey the Joint Opinion expressed the view that when the facts underlying a prior holding are newly found to be different from what this Court had previously assumed, the new finding will constitute grounds for overruling a prior case such as Roe. 112 S.Ct. at 2811-2812, 120 L.Ed.2d at 703-704. The Joint Opinion even noted that such newly discovered facts can not only justify overruling a prior case of great public notoriety, they can even require it, as was the case in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954).

The issues of personhood, and the capacity to feel pain, being as important as they are, we submit that such is the case here.

The task before this Court may be daunting, but the application of reasoned judgment to the facts of this case will enable this Court to perform this task, one which it ultimately must face anyway. *See*, Casey, *supra*, 112 S.Ct. at 2806, 120 L.Ed.2d at 697.

This Court should take this case and overrule Roe.

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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